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No. 84-1989

IN THE

Supreme Court of the United States

October Term, 1984

ELMER SHORTER,
as Personal Representative of
the Estate of DOREEN V. SHORTER, Deceased,
Petitioner,

vs.

ROBERT E. DRURY, M.D., et ux.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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I. RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Respondents respectfully submit that, because it is the only purported question of federal law petitioner raised, the sole question presented for review should be:

Whether the trial court's submission of assumption of risk to the jury in a wrongful death medical malpractice action against a private defendant violated First Amendment rights under the free exercise clause where a blood transfusion was refused for religious reasons and it was undisputed that, notwithstanding defendant's alleged negligence, death would not have occurred had the transfusion been permitted.

II. STATEMENT OF THE CASE

This is a wrongful death medical malpractice action arising out of the death from bleeding of Doreen Shorter, a Jehovah's Witness, who, along with her husband, for religious reasons refused to allow a blood transfusion that, according to the undisputed evidence at trial, would have averted her death.

Dr. Drury, a family practice physician, treated Doreen Shorter's pregnancy from October 4 to November 30, 1979. (RP 639:10-15.) In November, Dr. Drury diagnosed Mrs. Shorter as having a missed abortion — a condition where the fetus dies in the womb, but does not spontaneously abort. (RP 33:2-12; 35:1-5; 38:3-6; 73:13-18.) After making sure the fetus was dead, Dr. Drury recommended a dilatation and currettage (D&C) to evacuate the fetus from the uterus. (RP 166:5-172:14.)

When a missed abortion occurs, it is medically prudent to evacuate the uterus to guard against infection and disseminated intravascular coagulapathy (DIC) — a condition where the mother's blood loses its ability to clot. (*See, e.g.*, RP 213:4-214:5.) Although one can wait a short time after fetal demise to see if the fetus will spontaneously expel, it is not advisable to wait long because of the risk of infection and DIC. (*See, e.g.*, RP 169:7-15; 170:16-171:6; 172:1-14; 188-7:15-18.)

The experts agreed that some form of evacuation of the uterus was appropriate. To achieve evacuation, there are three alternatives: (1) blunt and sharp currettage; (2) suction currettage; and (3) prostaglandin suppositories. All three methods of evacuation carry the risk of either perforation or rupture of the uterus and of bleeding. (*See, e.g.*, RP 188-18:2-189-19:12; 460:23-462:9; 492:5-493:25; 505:15-506:10; 575:16-576:3.) With each method of uterine evacuation and with mere watchful waiting, the possibility of blood loss exists.

Dr. Drury discussed his diagnosis and recommendations with both Mr. and Mrs. Shorter. (RP 166:5-172:14; 425:2-8.) He described the D&C procedure and advised of the risks of uterine perforation and bleeding with a D&C. Dr. Drury also discussed the alternative of doing nothing — watchful waiting — and the attendant risk of spontaneous bleeding due to DIC. (RP 166:8-168:1; 168:6-169:15; 170:15-171:6; 171:18-172:14.) Mr. Shorter conceded that Dr. Drury had informed him of the risk of bleeding, albeit remote, with the D&C. (RP 414:19-415:7.)

On November 29, the day before the scheduled D&C, Mrs. Shorter sought a second opinion from Dr. Allen Ott, an obstetrician, who confirmed the diagnosis of missed abortion and recommended a D&C. (RP 188-3:25-188-4:22; 188-5:23-25.) Dr. Ott told Mrs. Shorter "she could certainly bleed during the procedure" and testified that "she was well aware of that possibility." (RP 188-6:12-13.) He also told her "that [with] any kind of operation people can certainly bleed; that the fact that she wouldn't accept blood might be dangerous to her if she indeed started to bleed during this procedure." He testified that she said "she understood this but . . . she had faith in the Lord and that things would work out. . . ." (RP 188-10:19-188-12:6.)

Contrary to petitioner's assertion at page 21 of his Petition for Writ of Certiorari, Dr. Ott's warnings about the risk of blood loss were not limited to blood loss from DIC. (*See* RP 186-6:12-13; 188-10:19-188-12:6; 188-26:12-25), although Dr. Ott also warned of that risk of bleeding. (RP 188-25:20-188-26:6.) Dr. Ott clearly advised Mrs. Shorter of the risk of bleeding with the D&C and the risk that she could bleed to death if bleeding occurred and she refused a transfusion. (RP 188-26:12-25; CP 116-17.)

On November 30, Dr. Drury admitted Mrs. Shorter to the hospital for the D&C. (RP 417:6-16.) On admission, Mr. and Mrs. Shorter signed a form entitled "Refusal to Permit Blood Transfusion." (RP 529:2-530:13; 616:18-617:16; 619:13-620:3; Exhibit 9.) The form provided:

> I request that no blood or blood derivatives be administered to Doreen V. Shorter during this hospitalization. I hereby release the hospital, its personnel, and the attending physician from any responsibility whatever for unfavorable reactions or any untoward results due to my refusal to prevent the use of blood or its derivatives and I fully understand the possible consequences of such refusal on my part.

Dr. Drury performed the D&C on November 30, and Mrs. Shorter went to the recovery room at 9:15 a.m. in stable condition. (RP 689:15-690:21.) Contrary to petitioner's suggestion at pages 6-7 of his Petition, there was no indication that Mrs. Shorter was bleeding profusely at the time of or immediately after the procedure. (RP 689:15-25; 690:18-692:12; 698:4-20.) As Dr. Guildner, the anesthesiologist, testified, there were no significant changes in Mrs. Shorter's vital signs to indicate rapid hemorrhaging. (RP 698:4-20.) Mrs. Shorter was awake, responding, and talking after the surgery. (RP 690:22-691:12.) At 9:45, blood in Mrs. Shorter's urine was noted. (RP 692:3-6.) Dr. Drury was called and Dr. Cooper, a urologist, saw Mrs. Shorter. (RP 177:22-178:20; 652:5-14; 692:7-17.)

Dr. Cooper talked to Mr. Shorter and told him that "his wife would have to have a second operation, that they would probably find a hole in the bladder, in addition to probably other problems," and that "she needed blood in the worst way because [they] were unable to support her blood pressure . . . with the fluids [they] were giving her." (RP 727:20-728:2.) Mr. Shorter responded that he could not allow that. (RP 728:3-5.)

Meanwhile, Dr. Drury had called Dr. Ott and both doctors went to the hospital. (RP 188-12:11-15; 652:22-653:1.) Before they arrived, Dr. Meagher, another anesthesiologist, began administering fluids — normal saline and lactated Ringer's solution — in an attempt to expand blood volume and elevate blood pressure. (RP 702:13-18; 703:10-16; 706:10-22; 728:7-14.) Dr. Meagher explained to Mrs. Shorter that "it probably would be necessary to utilize a whole blood transfusion to save her life" and that "she was probably going to die if she didn't accept a blood transfusion." (RP 703:17-704:3.) Mrs. Shorter refused, telling Dr. Meagher that "she felt blood should not be administered to her, she had signed a legal document directing that no blood be given to her and that if God wanted her to die, then this is what would happen. If he wanted her to live, she would live." (RP 704:4-13.)

After Dr. Drury and Dr. Ott arrived, arrangements were completed for exploratory surgery. Dr. Ott spoke again with Mrs. Shorter and told her he thought "that there was a perforation of her uterus and . . . a perforation of her bladder as well," and that they "needed to take her back to surgery to stop the bleeding that was continuing or she would essentially bleed to death." (RP 188-14:2-14.) Dr. Ott tried to convince her to accept blood, but she refused. (RP 188-14:2-14.)

Before the second surgery, all of the physicians, except Dr. Guildner, discussed the urgency of the situation and the need for a transfusion with the Shorters. The imminent danger of death without a transfusion was explained, but both Mr. and Mrs. Shorter remained adamant in their refusal to permit a transfusion. (RP 180:6-181:14; 188-14:2-16; 188-28:6-16; 188-29:17-188-31:1; 526:20-528.1; 654:16-655:8; 703:10-706:4; 727:20-728:17.)

Mrs. Shorter was then taken back to the operating room where Dr. Ott, with Dr. Drury assisting, performed an exploratory laparotomy and hysterectomy and Dr. Cooper repaired the bladder perforation. (RP 188-14:17-188-15:8.) Both during and after the surgery, Mr. Shorter was advised of the urgency of his wife's condition and the need for blood. Mr. Shorter persisted in his refusal, despite repeated warnings that Mrs. Shorter would die without a transfusion. (RP 188-31:5-18; 528:2-15; 655:9-21; 708:17-709:3; 718:13-719:11.)

Eventually, Mrs. Shorter was transferred to intensive care by Dr. Spencer, a critical care specialist. (RP 717:20-718:5; 719:14-23.) He too tried to convince Mr. Shorter to permit a transfusion, but to no avail. (RP 718:13-719:11.) Mrs. Shorter died later that afternoon.

At trial, the experts called by both parties agreed that, notwithstanding Dr. Drury's claimed negligence, Mrs. Shorter would not have died had she or her husband not refused to permit a blood transfusion. (RP 188-31:19-24; 262:3-8; 329:5-9; 466:17-467:8; 578:14-17; 597:5-15; 658:8-11; 719:24-720:12; 728:18-729:6.) No evidence was introduced suggesting that a blood transfusion would *not* have saved Mrs. Shorter's life. It was undisputed at trial that death would not have followed from any of Dr. Drury's claimed negligence had the Shorters permitted a transfusion.

Contrary to petitioner's one-sided factual narrative of the evidence presented to establish Dr. Drury's negligence, there was ample evidence that Dr. Drury complied with applicable standards of care in Mrs. Shorter's treatment. (RP 188-5:23-25; 188-17:10-188-19:12; 188-25:25-188-26:11; 188-31:25-188-32:12; 188-32:25-188-33:3; 268:21-269:6; 318:20-319:1; 325:15-17; 325:25-326:12; 327:5-11; 365:9-19; 377:1-6; 454:24-457:15; 458:16-463:2; 495:6-12; 504:20-506:1; 575:7-576:3; 578:18-21; 581:3-16; 590:20-593:1; 593:17-594:17; 595:8-596:11; 706:23-708:16.)

Although Dr. Drury's claimed negligence was heavily disputed at trial, certain facts bearing on the question of the Shorters' assumption of risk were undisputed:

a. Mrs. Shorter and her husband, long before meeting Dr. Drury, had chosen to follow religious tenets of the Jehovah's Witness faith prohibiting blood transfusions; (RP 387:18-388:2; 390:2-391:15; 624:4-626:5.)

b. Before Dr. Drury performed the D&C, Mr. and Mrs. Shorter signed a "Refusal to Permit Blood Transfusion" discharging Dr. Drury from all responsibility for any untoward results from the refusal to permit a transfusion; (RP 529:20-530:13; 616:18-617:16; 619:13-620:3; Exhibit 9.)

c. Before signing that release, Mrs. Shorter knew she could bleed and she could die if she refused to permit a transfusion; (RP 188-11:19-188-12:10; 188-25:20-188-26:25; *see also* RP 629:15-632:11.)

d. After the D&C, when bleeding became apparent, the Shorters repeatedly were apprised of the gravity of the situation and the need for a transfusion to avoid imminent death, but persisted in their refusal to permit a transfusion; (RP 180:6-181:14; 188-28:6-16; 188-29:17-188-31:1; 188-31:5-18; 526:20-528:15; 655:9-21; 703:10-706:9; 706:16-22; 708:17-709:3; 718:20-719:11; 727:5-728:15.)

e. Mrs. Shorter would not have died, notwithstanding any claimed negligence by Dr. Drury, had she or her husband permitted a blood transfusion. (RP 188-31:19-24; 262:3-8; 329:5-9; 466:17-467:8; 578:14-17; 597:5-15; 658:8-11; 719:24-720:12; 728:18-729:6.)

After the close of the evidence, the trial court denied defendants' motion for directed verdict and submitted the case to the jury with instructions enabling them to determine whether the Shorters assumed the risk of death from bleeding by their refusals to permit a transfusion and to determine to what degree that assumption of risk, if any, contributed to Mrs. Shorter's death.

On October 15, 1982, the jury returned a special verdict finding that Dr. Drury was negligent, his negligence was a proximate cause of Mrs. Shorter's death, the total death damages were $412,000, the Shorters knowingly and voluntarily assumed the risk of Mrs. Shorter's death from bleeding, and their conduct contributed 75% to Mrs. Shorter's death. (Pltf CP 38-39.)

After both parties' motions for judgment notwithstanding the verdict were denied, petitioner appealed to Division I of the Washington Court of Appeals. No cross-appeal was taken from the jury's finding of Dr. Drury's negligence. The court of appeals certified the case directly to the Washington Supreme Court. In a 5-4 decision, the Washington Supreme Court affirmed the trial court in all respects. The Washington Supreme Court held that the "Refusal to Permit Blood Transfusion" the Shorters signed was properly placed before the jury, assumption of risk was a valid defense, the instructions to the jury on assumption of risk were not in error, and there was no violation of the free exercise clause of the First Amendment. The constitutional question was not discussed in the dissenting opinion.

Petitioner has petitioned this Court for a writ of certiorari. The sole federal question raised is petitioner's assertion that submission of assumption of risk to the jury violated the free exercise clause of the First Amendment.

III. REASONS FOR DENYING THE WRIT

Respondent respectfully submits that the Petition for Writ of Certiorari should be denied because the Washington Supreme Court has not decided an important question of federal law which should be settled by this Court or decided a federal question in a way in conflict with applicable decisions of this Court within the meaning of Rule 17.1(c), Rules of the Supreme Court.

The Washington Supreme Court merely decided whether the Washington common law doctrine of assumption of risk had continuing validity and applicability in a wrongful death medical malpractice action between two private parties where it was undisputed that death would not have occurred but for refusal to permit a blood transfusion. The Washington Supreme Court found that the assumption of risk doctrine had retained validity, did apply, and could operate to apportion damages for the death according to the respective degrees that defendant's negligence and the Shorters' assumption of risk contributed to the death. The Washington Supreme Court also held that there was no state action depriving plaintiff of rights under the First Amendment.

This is not a case with special and important reasons for granting certiorari. This is not a case involving principles, the settlement of which is of importance to the public, but rather is one of importance only to the parties. Indeed, no similar cases in any jurisdiction have been found raising the question of the effect of a Jehovah's Witness' refusal of blood in a medical malpractice wrongful death action. The case simply does not pose problems beyond the episodic. As this Court recognized in *Rice v Sioux City Cemetery*, 349 U.S. 70, 74, 99 L. Ed. 897, 901, 75 S. Ct. 614 (1954):

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . . "Special and important reasons" imply a reach to a problem beyond the academic or episodic.

This case is simply one governed by state law regarding the degree to which each private party in a wrongful death medical malpractice action must bear responsibility for death damages when it is undisputed that the death would not have occurred, despite any claimed negligence of defendant, had a blood transfusion been permitted. The mere fact that the assumption of risk by the Shorters was for religious reasons does not mean that the state court denied them First

Amendment rights by submitting the issue of assumption of risk to the jury.

This is not a case where the trial court or jury was asked to decide the validity or reasonableness of religious beliefs as in *United States v. Ballard*, 322 U.S. 78, 88 L. Ed. 1148, 64 S. Ct. 882 (1944). Nor is it a case where plaintiffs were denied a public welfare or workmen's compensation benefit, forcing plaintiffs to choose between receiving the state benefit or exercising religious beliefs, as in *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 965, 83 S. Ct. 1790 (1963) or *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981). Nor is it a case where the state courts sanctioned or approved private deprivations of religious freedom, for here, even Dr. Drury respected the Shorters' religious beliefs and did not administer a blood transfusion contrary to their wishes. Compare in the racial discrimination context, *Shelley v. Kraemer*, 334 U.S. 1, 92 L. Ed. 1161, 68 S. Ct. 836 (1948) and *Barrows v. Jackson*, 346 U.S. 249, 97 L. Ed. 1586, 73 S. Ct. 1031 (1953).

Nothing in the trial court's action or the Washington Supreme Court's decision represents state interference with the Shorters' exercise of their religion. The jury's after-the-fact determination that the Shorters bore 75% responsibility for Mrs. Shorter's death in no way compelled or coerced the Shorters to forego the free exercise of their religious beliefs. Mr. and Mrs. Shorter exercised their First Amendment rights to the fullest. Dr. Drury respected their religious beliefs and did not administer a blood transfusion against their will. The jury merely determined the degree to which the Shorters, as opposed to Dr. Drury, must bear reponsibility for the death that ensued their voluntary exercise of their religious beliefs.

In essence, petitioner now seeks to have this Court hold that the First Amendment requires the state courts to order Dr. Drury to bear the entire cost of the Shorters' refusal, on religious grounds, to permit a transfusion, even though that cost — Mrs. Shorter's death — would not have occurred had the transfusion been permitted. The Shorters' First Amendment rights do not require that another private party must bear the cost of their exercise of their religious beliefs.

Contrary to petitioner's assertion in his Petition, this case does not directly involve 676,591 active Jehovah's Witnesses and 934,719 other individuals who attended the Jehovah's Witnesses' annual Memorial. Nor does petitioner's First Amendment argument impact all individuals who refuse blood transfusions for non-religious reasons. This case only directly impacts Dr. Drury and the Shorters for it is merely a dispute between these private parties over their respective responsibility for the death of Mrs. Shorter.

Furthermore, to the extent petitioner wishes to question "the extent to which a competent adult may assume the risk of bleeding to death" or the "extent to which civil liability is avoided by the release approved by the American Medical Association," this case clearly involves matters governed purely by state law. It is not the province of federal law to establish guidelines for resolving such issues or to establish a uniform policy throughout the states for dealing with transfusion releases. These are matters of state tort law and but for the fact that the Shorters refused a transfusion for religious reasons, petitioner clearly would have no basis for asserting any conceivable federal question. And, simply because the refusal of a transfusion was for religious reasons, the Washington courts did not in any way infringe upon the Shorters' First Amendment right to the free exercise of religious beliefs.

A. Submission of Assumption of Risk to the Jury Did Not Violate Plaintiff's Constitutional Rights.

Petitioner urges that the Washington Supreme Court erred in holding that submission of assumption of risk to the jury did not violate the free exercise clause of the First Amendment. The free exercise clause of the First Amendment, as applied to the states through the Fourteenth Amendment, however, proscribes only state action which has a coercive effect on an individual's practice of his religion. *See, e.g., Board of Education v. Allen*, 392 U.S. 236, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968); *Abington School District v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963). Here, the Washington courts denied plaintiff no rights under the First Amendment.

Indeed, the only free exercise clause case petitioner cites in support of his First Amendment claim is *Thomas v. Review Board*, 450 U.S. 707, 67 L. Ed. 2d 624, 101 S. Ct. 1425 (1981), where this Court stated at 450 U.S. 717-18:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

But, *Thomas* involved the state's denial of unemployment compensation benefits to a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments. This Court, following *Everson v. Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504 (1947) and *Sherbert v. Verner*, 374 U.S. 398, 10 L. Ed. 2d 968, 83 S. Ct. 1790 (1963), found that the state's denial of that public benefit put Thomas "to a choice between fidelity to religious belief or cessation of work" and, therefore, the coercive impact on his exercise of religious belief was clear.

This case is distinguishable from *Thomas*, however, because it does not involve denial of any public benefit forcing plaintiff to choose between the public benefit or the exercise of religious beliefs. Here, no public benefit was involved and no state action compelled or coerced the Shorters to forego the exercise of religious beliefs.

Instead, this case deals solely with the allocation of liability between two private parties. The Shorters were free to accept the tenets of their faith, believe in them and exercise their right to practice those beliefs. But, the right to free exercise of religion did not give them the right to impose liability on another private party for death resulting from the voluntary practice of religion.

The major thrust of the petitioner's First Amendment argument appears to be directed at the Washington Supreme Court's conclusion that no state action was present in this case. Petitioner, having cited only one case — *Thomas, supra* — in support of the proposition that plaintiff's rights under the free exercise clause of the First Amendment were violated, cites several cases — *Shelley v. Kraemer, supra, Barrows v. Jackson, supra,* and *New York Times v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) — in support of his proposition that the actions of the Washington courts and jury constituted state action.

But, those cases are distinguishable and do not support the proposition that there was sufficient state action denying the Shorters' constitutional rights in this case. Unlike *Shelley, Barrows,* and *New York Times,* no coercive power of the state judiciary was exercised here to deny petitioner any rights guaranteed by the constitution.

Shelley involved the state courts' judicial enforcement of covenants restricting the use or occupancy of real property based on race or color. The covenants were entered into by private persons and, standing alone, while voluntarily adhered to, were not violative of the Fourteenth Amendment because there was no state action. This Court held, however, that judicial enforcement of the racially restrictive covenants was state action violative of the equal protection clause, reasoning that petitioners would have been able to occupy the properties without restraint had the state courts not judicially enforced the restrictive covenants.

Similarly, *Barrows* involved judicial enforcement of racially restrictive covenants by the award of money damages against an individual violating the covenant. As in *Shelley,* this Court found state action in the judicial enforcement of the covenant — coercion by the state courts of an individual to continue to use the property in a racially discriminatory manner. By awarding damages against one who chose not to adhere to the racially restrictive covenant, the state put its sanction behind the discriminatory covenants and encouraged their use.

Finally, in *New York Times*, this Court held that the Alabama courts' application of state law in a libel action brought by a public official against critics of his official conduct, making a publication "libelous per se" if the publication is false and tends to injure a person's reputation was constitutionally deficient because it failed to provide safeguards for freedom of speech and press and failed to require a showing of actual malice. In explaining why the Alabama rule was constitutionally deficient, this Court reasoned at 376 U.S. 279-80:

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount — leads to a comparable "self-censorship." Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. [Footnote omitted.] Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone." . . . The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
>
> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

This case is distinguishable from *Shelley*, *Barrows*, and *New York Times*, *supra*. Here, there was no judicial stamp of approval or judicial sanction by the state court of private conduct which in any way infringed upon constitutional rights, as there was in *Sherbert* and *Barrows*. Dr. Drury did not infringe on the Shorters' free exercise of religious beliefs. He did not administer a transfusion against their will, but respected their right to exercise their religious beliefs against transfusions to the fullest. Nor was there any imposition of a penalty by the state courts to coerce any private individual to deprive plaintiff of any constitutional rights as there was in *Barrows* and *New York Times*. Here, the state courts did nothing to infringe on the Shorters' free exercise of religion or coerce them, in any way, to forego the exercise of their religious beliefs. The state courts merely allowed the jury to determine the degree to which the Shorters, as opposed to Dr. Drury, bore responsibility for a death that undisputedly would not have occurred, notwithstanding any claimed negligence by Dr. Drury, had the Shorters not refused a blood transfusion.

As was noted in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978), and *Evans v. Abney*, 396 U.S. 435, 24 L. Ed. 2d 634, 90 S. Ct. 628 (1970), not every state court application of neutral principles of state law or state court denial of relief to private parties constitutes state action within the purview of the constitution. As this Court noted in *Evans*, *supra*, 396 U.S. at 444 and 446, in holding that the Georgia courts did not violate the Fourteenth Amendment by terminating a testamentary trust when it could no longer be operated exclusively for whites as the testator had instructed:

> . . . The construction of wills is essentially a state-law question . . . and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia Court had no alternative under its relevant trust laws, which are longstanding and neutral with regard to race, but to end the Baconsfield trust and return the property to the senator's heirs.

> The only choice the Georgia courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent and the Constitution imposes no requirement upon the Georgia courts to approach Bacon's will any differently than they would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and nondiscriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.

Here, the Washington courts merely applied state assumption of risk law to determine private parties' responsibility for the death of Mrs. Shorter. The common law principles applied by the Washington courts were neutral and would apply equally in any wrongful death medical malpractice action where plaintiffs voluntarily refuse a blood transfusion that would have averted death, regardless whether the motivation for refusing the transfusion was religious. The First Amendment does not require the Washington courts to apply assumption of risk law differently to determine the respective rights and liabilities of the parties to this litigation simply because the Shorters assumed the risk of death from bleeding by refusing a transfusion on religious grounds. The Shorters' First Amendment rights do not require that another private party must bear the costs of the exercise of their religious beliefs or that the Washington courts must force another private party to bear those costs.

B. The Federal Question Raised by Petitioner is Not Dependent Upon the Washington Supreme Court's Finding of Fact That the Shorters Understood and Expressly Assumed the Risk of Bleeding to Death.

Petitioner, relying upon *Fiske v. Kansas*, 274 U.S. 380, 71 L. Ed. 1108, 47 S. Ct. 655 (1927); *Creswill v. Grand Lodge, Knights of Pythias of Georgia*, 225 U.S. 246, 56 L. Ed. 1074, 32 S. Ct. 822 (1912); and *Sterling v. Constantin*, 287 U.S. 378, 77 L. Ed. 375, 53 S. Ct. 190 (1932), asks this court to analyze the facts to determine whether the Washington Supreme Court correctly found that the Shorters understood and expressly assumed the risk of bleeding to death. Each of those cases, however, is inapposite.

In both *Fiske* and *Creswill, supra*, this Court found that a federal right had been denied as a result of a finding shown by the record to be without *any* evidence to support it. Here, there was ample evidence to support a finding that the Shorters understood and expressly and voluntarily assumed the risk of bleeding to death. *See* factual narration at page 7, *supra*. Furthermore, as previously discussed at pages 11-17, *supra*, there was no denial of any federal right by the finding that the Shorters had voluntarily and expressly assumed the risk of death from bleeding.

Sterling, supra, is also distinguishable from this case. *Sterling* involved the federal district court's issuance of an injunction restraining the governor from enforcing his military order restricting complainants' production of oil. The district court found no exigency warranting the imposition of martial law and found the governor's order violative of complainants' Fourteenth Amendment rights. Appellants argued that the federal courts were powerless to intervene or to review the governor's order. In *Sterling*, therefore, the questions of fact and law were so intermingled as to make it necessary for the courts to review the facts in order to decide the federal question.

The same was true in *New York Times, supra.* There, the question of whether the statements made in the allegedly libelous publication were protected by the First Amendment necessarily required the Court to analyze the facts to determine whether the statements were made with actual malice or were simply honest misstatements of fact. The questions of fact and law again were so intertwined as to make it necessary to review the facts to decide the federal question.

That is not the case here. It is not necessary for this Court to determine the sufficiency of evidence as to whether the Shorters knew and understood the risk of death from bleeding or voluntarily chose to encounter the risk in order for this Court to determine whether the First Amendment prohibits a state court from entertaining the assumption of risk defense where the alleged assumption of risk was for religious reasons.

C. No Federal Question is Involved in the Washington Supreme Court's Decision Not to Consider Additional Evidence.

Petitioner asserts that the Washington Supreme Court erred in failing to grant his motion to take additional evidence — the affidavit of Randall D. Austin — after the Washington Supreme Court had rendered its opinion. Whether or not the Washington Supreme Court should take additional evidence before or after rendering its decision is purely a matter of state law.

Washington Rule of Appellate Procedure (RAP) 9.11 provides the limited remedy for the taking of additional evidence on appeal in Washington. That rule provides:

> (a) *Remedy Limited.* The appellate court may only on its own initiative direct that additional evidence be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to

> excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.
>
> (b) *Where Taken.* The appellate court will ordinarily direct the trial court to take additional evidence and find the facts based on that evidence.

Petitioner's motion to take additional evidence before the Washington Supreme Court did not come within the limited scope of RAP 9.11. The limited relief under RAP 9.11 is available only upon the appellate court's initiative and only before a written decision is filed. Here, the Washington Supreme Court did not, *sua sponte*, decide that additional evidence was necessary to resolve the issues on appeal and appellant's motion to take additional evidence was made more than two weeks after the court's written opinion was filed.

Furthermore, under RAP 9.11, all six criteria for taking additional evidence must be met. All six criteria were not met here. Additional proof was not needed to fairly resolve the issues on appeal. The additional evidence would not have changed the result. It was not equitable to excuse the petitioner's failure to discover and present the evidence at trial. The adequacy of remedy through post-judgment motions had never been explored. And, it would not be inequitable to decide the case solely on the evidence that was presented at trial.

D. Questions as to the Inviolateness of a Medical Liability Release and the Trial Court's Failure to Consider Only Mrs. Shorter's Conduct on the Question of Assumption of Risk Should Not Be Considered by This Court as Those Questions Were Not Raised in the State Court Proceedings.

Petitioner for the first time in his Petition for Writ of Certiorari, argues that "a medical liability release form signed by a competent adult should be held to be inviolate, even in the marriage arrangement," and asserts that "the trial court erred in failing to limit the jury to consider only assumption of risk on the part of Doreen Shorter when awarding damages." See pages 28-30 of the Petition for Writ of Certiorari. At no time in the proceedings before the trial court or the Washington Supreme Court did petitioner raise either issue. Where questions were not raised in the state court proceedings, such questions are not open in a proceeding on petition for certiorari. *See e.g., Ellis v. Dixon*, 349 U.S. 458, 99 L. Ed. 1231, 75 S. Ct. 850, *rehearing denied*, 350 U.S. 855, 100 L. Ed. 759, 76 S. Ct. 37 (1955).

IV. CONCLUSION

Based on the foregoing, respondents respectfully request the Court to deny petitioner's Petition for Writ of Certiorari to the Washington Supreme Court.

Respectfully submitted this 26th day of July, 1985.

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